

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
to open a docket for load serving entities in)	
Michigan to file their capacity demonstrations as)	Case No. U-18441
required by MCL 460.6w.)	
_____)	

At the February 5, 2018 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On December 21, 2016, Governor Rick Snyder signed Public Act 341 (Act 341) into law, which amended 1939 PA 3; MCL 460.1 *et seq*, and became effective on April 20, 2017. Among other things, Act 341 mandates that the Commission must establish a state reliability mechanism (SRM) pursuant to MCL 460.6w(8). *See*, Case No. U-18197. Under the SRM construct, the Commission has responsibility for overseeing the sufficiency of all electric providers' long term arrangements for electric capacity.

MCL 460.6w(8) requires each electric utility, alternative electric supplier (AES), cooperative electric utility, and municipally-owned electric utility (collectively referred to as electric providers) to demonstrate to the Commission, in a format determined by the Commission, that each electric provider owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the Midcontinent Independent System Operator, Inc. (MISO) or by PJM

Interconnection, LLC (PJM), or the Commission, as applicable. This is known as a capacity demonstration. In MCL 460.6w(8)(a) and (b), the Legislature established the dates by which all electric providers must file their capacity demonstrations with the Commission. Regulated electric utilities' filings were due no later than December 1, 2017. Capacity demonstration filings from AESs, cooperatives, and municipally-owned electric utilities are due no later than February 9, 2018.

In the September 15, 2017 order in Case No. U-18197, the Commission adopted a format for the SRM capacity demonstration filings required by MCL 460.6w(8) (September 15 order); and, on the same date, the Commission opened this docket for the purpose of receiving those filings.

On January 16, 2018, Cloverland Electric Cooperative (Cloverland) filed a motion for protective order. The motion is accompanied by a proposed Protective Order with an attached Nondisclosure Certificate. Responses were due no later than February 1, 2018. On February 1, 2018, Constellation NewEnergy, Inc. and Constellation Energy Services, Inc. (together CNE), Northern States Power Company and Upper Peninsula Power Company (together NSP/UPPCo), Consumers Energy Company (Consumers), and FirstEnergy Solutions, Corp. (FES) filed responses to Cloverland's motion. On February 2, 2018, DTE Electric Company (DTE Electric) filed a late response to the motion.

In its motion, Cloverland contends that, subsequent to issuance of the September 15 order, the Commission Staff (Staff) requested electric providers to provide the Staff with 2018 peak load contribution (PLC) data as determined by MISO or PJM (whichever independent system operator (ISO) is applicable to the filing entity), either by providing the information directly or by authorizing the ISO to provide the information to the Staff. While acknowledging that the Commission made provision for the filing of confidential information, Cloverland argues that

“allowing parties to file confidential information under seal is insufficient to protect the confidentiality of information provided the Staff by MISO or PJM, which are not parties.”

Motion, p. 2.

CNE supports Cloverland’s motion, but points out that Cloverland’s proposed Protective Order conflicts with the Commission’s ruling regarding confidentiality in the September 15 order, p. 45, because it would permit parties other than the Commission and the Staff to access confidential documents filed in this docket. CNE further notes that Cloverland’s proposed Protective Order contemplates that the information is being filed in a contested case proceeding where it makes reference to an Administrative Law Judge, testimony, hearings, and briefing. CNE offers a revised version of the proposed Protective Order that corrects these deficiencies.

NSP/UPPCo decline to take a position on the merits of the motion, noting that a protective order could be issued in each specific show cause proceeding. Notwithstanding, NSP/UPPCo request that, should the Commission adopt the proposed Protective Order, it revise the document to ensure that confidential information is made available only to the Commission and the Staff, and not to other parties to this proceeding or any of the providers required to make filings.

Consumers asserts that the September 15 order already provides for confidential treatment of the PLC data provided to the Staff, but supports clarification that the information will be treated confidentially. If it is approved, Consumers requests that Cloverland’s proposed Protective Order be revised, and that it reflect that parties may seek to obtain confidential information in other proceedings, such as a show cause.¹ DTE Electric’s response is very similar to Consumers’.

FES supports the entry of a Protective Order in the form offered by CNE.

¹ This concern is addressed in paragraph 6 of Exhibit A.

In the order opening this docket, the Commission indicated that “Commercially sensitive information may be filed confidentially in this docket, in accordance with the September 15, 2017 order in Case No. U-18197.” September 15, 2017 order in Case No. U-18441, p. 3. In the September 15 order, p. 45, the Commission stated as follows:

The Commission is not persuaded that all electric provider filings should be made available to all stakeholders subject to a protective order. The regulated utilities have failed to provide a convincing reason to deviate from the treatment these filings have received in the annual reliability investigations. *See*, the May 11, 2017 order in this docket, item no. 51. The Commission adopts the confidentiality provisions pertaining to the proceeding initiated by the January 12, 2017 order in this docket. All electric providers will be treated identically with respect to confidentiality. Thus, electric providers may request assistance from the Executive Secretary in making confidential filings of commercially sensitive information in the docket in Case No. U-18441. Confidential filings may be viewed by the Staff, but may not be viewed by other electric providers. If a show cause is commenced, any party may seek intervention in that matter, and questions regarding discovery will be handled in the first instance by the Administrative Law Judge.

Thus, the Commission squarely addressed the confidentiality of the capacity demonstration filings in the Case No. U-18197 order. The Commission’s ruling on this issue was not appealed.

As shown, the Commission adopted “the confidentiality provisions pertaining to the proceeding initiated by the January 12, 2017 order” in Case No. U-18197, and made those provisions applicable to confidential filings of commercially sensitive information in the Case No. U-18441 docket. Those provisions include the Commission’s adoption of a protective order, for use by any party so desiring, attached as Exhibit A to the January 12, 2017 order opening the docket in Case No. U-18197.²

Thus, the Commission observes that several protections were in place before the filing of Cloverland’s motion. Additionally, on rehearing, the Commission addressed concerns regarding

² Admittedly, any party making use of the Case No. U-18197 protective order would need to change the docket number to U-18441 and the date of the relevant order to September 15, 2017.

the Freedom of Information Act (FOIA), by adopting procedures that would allow electric providers to present required information for review by the Staff, while not requiring the Staff to retain copies of the documents. November 21, 2017 order in Case No. U-18197, pp. 5-6, 14. Moreover, the Commission notes that the ISOs may not provide the Staff with PLC data without having first received written consent from the applicable electric provider.

That said, the Commission is sensitive to the confidentiality concerns of all involved and acknowledges the significant support for the Protective Order proposed by Cloverland (in a revised form) shown in the responses. Unlike the protective order adopted in Case No. U-18197, the proposed Protective Order makes explicit reference to information provided to the Staff or the Commission by MISO or PJM. The Commission finds that the comments of CNE and the other parties are well taken, and adopts the revised version provided by CNE.

THEREFORE, IT IS ORDERED that the motion for a protective order filed by Cloverland Electric Cooperative is granted, and the Protective Order attached hereto as Exhibit A may be used by any electric provider in this proceeding in connection with the filing or provision of confidential information in this docket.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the appropriate court within 30 days of the issuance of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscdockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of February 5, 2018.

Kavita Kale, Executive Secretary

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion,)	
to open a docket for load-serving entities in Michigan)	
to file their capacity demonstrations as required by)	MPSC No. U-18441
MCL 460.6w)	
_____)	

PROTECTIVE ORDER

1. Confidential Information. For purposes of this Order only, "Confidential Information" consists of all information in written, oral or other tangible or intangible forms, furnished at the request of the Commission or the Commission Staff during the course of this proceeding which is designated "Confidential Information" by the party disclosing such information (including any person or entity not a party to this case to which a party to this case has directed non-party discovery) ("Disclosing Party") if the Disclosing Party believes that the material is confidential and proprietary and entitled to protection from public disclosure under Michigan or Federal law. Confidential Information shall also include any information provided by Midwest Independent System Operator, Inc. ("MISO") or by PJM Interconnection, LLC ("PJM") to the Commission or its Staff.

2. Use of Confidential Information. Members of the Commission and the Commission Staff assigned to assist the Commission with its deliberations shall have access to all Confidential Information that is submitted to the Commission under seal. No person to whom Confidential Information is made available pursuant to this Order may release Confidential Information to any other person except under the terms and conditions of this Order. Prior to the release of the Confidential Information counsel for the requesting party shall provide counsel

for the Disclosing Party an acknowledgment (Exhibit A) from such individual or entity that such individual or entity will abide by the terms of this Order.

3. Designation of Confidential Documents. Documents containing Confidential Information which are made available pursuant to this Order shall be stamped, labeled, or otherwise designated as “Confidential,” “Confidential Information,” “Proprietary,” or “Proprietary Information,” or using other words or symbols clearly indicating that the information is intended to be secure from public disclosure. “Confidential Information” included in information that is provided orally or visually shall be identified as Confidential or Proprietary when disclosed and shall be summarized in a writing so marked and delivered within ten (10) days following such disclosure. If the Disclosing Party inadvertently fails to mark as proprietary, confidential, or private information for which it desires Confidential Information treatment, it shall so inform the recipient. The recipient thereupon shall return the unmarked information to the provider of the designated material, and the Disclosing Party shall substitute properly marked information. In addition, if the Disclosing Party, at the time of disclosure, inadvertently fails to identify as proprietary, confidential, or private oral or visual information for which it desires confidential treatment, it shall so inform the recipient, provided that the Disclosing Party shall summarize the information in writing within ten (10) days thereafter. The recipient’s obligations under this Order in connection with the Confidential Information shall commence upon notice from the Disclosing Party of the failure to properly mark or identify the information. Any Information provided by MISO or PJM to the Commission or its Staff shall automatically be designated as confidential, without the necessity of marking the documents produced

4. Procedures. Written submission using Confidential Information shall be filed under seal with the Commission, to be maintained by the Docket Section of the Commission in envelopes clearly marked on the outside with the notation reflected in 5(b) below, or in another appropriate manner. Simultaneously, identical documents and materials, but with the protected information redacted, shall be filed, offered, introduced, or otherwise disclosed in the usual manner.

- (a) **Seal**. While in the custody of the Commission, the material containing Confidential Information shall be marked

**CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER
ISSUED , 2018, IN CASE NO. U-18441,**

and shall be placed in a separate portion of the record under seal, and the Commission shall take reasonable steps to protect such material from disclosure to persons not subject to the Order.

- (b) **Segregation of Files**. Parts of any writing, depositions reduced to writing, written examinations, interrogatories and answers thereto, or other written references or notes to Confidential Information, if filed with the Commission, shall be sealed, segregated in the files of the Commission, and withheld from inspection by any party not bound by the terms of this Order, unless such Confidential Information is released from the restrictions of this Order, either through agreement of the parties or, after notice to the parties and hearing, pursuant to an Order of the Commission and/or final order of a court of competent jurisdiction.
- (c) **Use of Sealed Information**. No information under seal pursuant to this Order shall be used in any manner except pursuant to Commission, administrative or judicial order or final order of an appellate court of competent jurisdiction in connection with this proceeding, after notice to the Disclosing Party and hearing, either unsealing such information or providing for the use of such information.
- (d) **Appeal**. Sealed portions of the record in this proceeding may be forwarded, under seal, to any appellate court considering this proceeding in accordance with applicable rules and regulations.

5. Preservation of Confidentiality. No person who is afforded access to any Confidential

Information by reason of this Order shall disclose the Confidential Information to anyone not specifically authorized to receive such information pursuant to the terms of this Order. Nor shall such persons use Confidential Information in any manner inconsistent with this Order. All persons afforded access to Confidential Information pursuant to this Order shall keep the Confidential Information secure in accordance with the purposes and intent of this Order and shall adopt all reasonable precautions to assure continued confidentiality, including precautions against unauthorized copying, use, or disclosure thereof.

6. Rights Under the Order. The Commission or the Commission Staff reserve the right to challenge whether a document of information is, in fact, Confidential Information, and whether such information can be withheld under Section 1 of this Order. By stipulating to entry of this Order, a requesting party does not concede that confidential treatment would be appropriate in any other proceeding, or that they would agree to such treatment of similar documents in another proceeding. The requesting party(ies) also specifically state(s) that the treatment of Confidential Information in the proceeding is of no precedential effect for other proceedings and reserve their rights to dispute such treatment in this or any other proceeding.

The Commission may subsequently declare that the protected status of a document or portion of a document designated as Confidential Information should not be continued and immediately communicate that declaration to the Parties. Thereafter, this Protective Order shall cease to apply to that document or portion of the document unless, within ten (10) days, the Disclosing Party files a pleading asserting that the information should continue to be protected and setting forth the basis for that assertion. The Disclosing Party shall bear the burden of proving that the information is entitled to continuing protection from disclosure. If the Commission finds that a document or portion of a document no longer qualifies for treatment

as “Confidential Information,” it shall remain subject to the protection afforded by this order for ten (10) days following the issuance of the Commission’s order.

7. Retention of Documents. Following completion of these proceedings, including any administrative or judicial review, and upon request of the Disclosing Party, all documents containing Confidential Information provided under the terms of this Order shall be returned to the Disclosing Party or destroyed within sixty (60) days following such request, except that (i) any notes or comments or materials prepared by counsel for the Commission or Commission Staff need not be returned provided that they are maintained in confidence by counsel in accordance with the terms of this Order, and (ii) electronic copies created pursuant to standard archival and back-up procedures may be retained provided that they are maintained in confidence in accordance with the terms of this Order. The obligation to return Confidential Information (should the Disclosing Party make such a request) shall be satisfied by return of all the Confidential Information or submission of an affidavit that the Confidential Information has been destroyed, returned, or following reasonable search, is lost and cannot be located, all subject to the exceptions set forth in the preceding and following sentences. It is intended that the Confidential Information is exempt from public disclosure. If the Commission or Commission Staff receives a request for disclosure of information, including any request for disclosure under the Michigan Freedom of Information Act, MCL 15.231 et seq., which requests encompasses Confidential Information covered by this Order, the Commission or Commission Staff will notify the Disclosing Party within seven calendar days of receiving the request and withhold disclosure of the Confidential Information for the maximum time allowed under the law to permit the Disclosing Party time to obtain relief, including injunctive relief, to prevent public disclosure.

8. Inapplicability. The obligation of this Order shall not apply to any Confidential Information if the Commission or Commission Staff can demonstrate that it:

- (a) is or becomes available to the public through no breach of this Order;
- (b) was previously known by the Commission or Commission Staff without obligation to hold it in confidence;
- (c) received from a third party other than MISO or PJM free to disclose such information without restriction;
- (d) is independently developed by the Commission or Commission Staff without the use of Confidential Information furnished to the party;
- (e) is approved for release by written authorization of the Disclosing Party, but only to the extent of such authorization;
- (f) is required by law or regulation to be disclosed, but only to the extent and for the purposes of such required disclosure, or is submitted to a regulatory commission, agency, or court of competent jurisdiction under a protective agreement or order;
- (g) is disclosed in response to a valid order of a court of competent jurisdiction or governmental body, but only to the extent of and for the purposes of such order, and only if the recipient first notifies the producer of the Confidential Information to seek an appropriate protective order.

9. Remedies. For purposes of enforcement, a Disclosing Party is an intended third-party beneficiary of an agreement with a Commission consultant to maintain the confidentiality of the information released to the consultant. A party releasing information to a consultant shall provide notice to the disclosing party of any breach or anticipated breach by the consultant or the agreement to maintain the confidentiality of the information or of this Order. Nothing in this Protective Order limits the rights and remedies, at law or in equity, of the producing party against the Commission or Commission Staff using the Confidential Information in a manner not authorized by this Protective Order, including the right to obtain injunctive relief to prevent or redress violations of this Protective Order.

10. Term. The rights granted and preserved under this Order shall not be extinguished or nullified by the entry of a final order in this case, MPSC Case No. U-18441 nor by the entry of any final order by an appellate court in any appeal of such final Commission order.

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_____)

Case No. U-18441

NONDISCLOSURE CERTIFICATE

(Exhibit A to Protective Order)

I hereby certify my understanding that access to Confidential Information is provided to me pursuant to the terms and restrictions of the Protective Order issued in Case No. U-18441 that I have been given a copy of and have read the Protective Order, and that I agree to be bound by the terms of the Protective Order. I am aware that the Disclosing Party asserts that Confidential Information, as defined in the Protective Order, includes information that is confidential, proprietary, and commercially sensitive. I understand that the contents of the Confidential Information, any notes or other memoranda, or any other form of information that copies or discloses Confidential Information, shall be maintained as confidential, shall not be disclosed to anyone other than in accordance with that Protective Order, and shall not be used for any purpose other than in connection with Michigan Public Service Commission Case No. U-18441, any administrative or judicial appeals in connection with this proceeding only.

Reviewing Representative

Date:

Title:

Representing: